

CASE – MOOT COURT COMPETITION 2008

COURSE OF EVENTS

Reading instructions:

In order to solve the problem, Moot Court participants are not required to acquire further knowledge in EU-law than what is described in the Case and the legal background. Participants should thus only use information concerning EU-law that is already provided.

Participants may pose questions and ask for clarifications to the organizers before.

1. The country of Sweden has ratified the European Convention on Human Rights and all its protocols. Sweden is also, since 1995 a member state of the European Union. The community's laws take precedence over the different member states' own national legislation. However international treaties entered into before membership in the Union are still valid, as is of course obligations according to the UN Charter.
2. Mohammed Ali is a citizen of the state of Sweden. He is the treasurer of an organisation responsible for sending money remittances, mainly to families and relatives in an African country, which has a very underdeveloped banking system; hence the need for the services which the organisation provides.
3. In early December 2001, the organisation and Mohammed Ali had all their bank resources and other financial assets frozen under the Commission's Regulation of 12 November 2001 (EC) no. 2199/2001. The EU Commission had previously been delegated the task of updating the Council of Ministers' regulations on sanctions against individuals with links to the Taliban regime, and later Al-Qaida and Osama bin Laden. Regulation 2199/2001 was therefore a change to the Council's Regulation no. 467/2001. The sanctions have since been confirmed and renewed by the Council and the Commission however currently under new regulations.
4. Due to the fact that security in the region is one of the EU's goals, the Council considered it to be imperative that implementation of sanctions was conducted at EU rather than national level. The Regulations were thus taken by the Council of Ministers by a qualified majority which in reality also prohibited any national actions to enact laws to implement the sanction's list from the UN.
5. EC Regulations are binding and directly applicable in the member states. In practical terms, the Swedish Financial Supervisory Authority (FI) informed financial institutions in Sweden which individuals and accounts were affected. These financial institutions then reported to the FI that they had ordered the measures to be taken.
6. Under the Regulation it was also a criminal act for anyone to make funds or financial resources available to Mohammed Ali and to engage in any business activities or financial relationships with him. The legal background and more information on the decisions sequence can be found in a separate appendix.

LEGAL PROCEEDINGS BEFORE THE EU COURTS

1. Because, according to Mohammed Ali, Sweden has no effective domestic legal remedies to have the sanctions lifted or receive compensation, he applied to the courts of the European Union.
2. Before the Court of First Instance, Mohammed Ali claimed that he had been subject to a sanction of a penal nature, before his alleged guilt had been proved by an independent and impartial court of law. He considered this a breach of the right to a fair and public hearing in accordance with article 6:1 of the European Convention on Human Rights. He also considered himself to be perceived as guilty of a crime without his guilt having first been legally established by a court of law. He claimed this to be a breach of 6:2 of the European Convention on Human Rights, which states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Finally, he considered that the freezing of his bank assets restricted his rights under article 1 of the first Protocol of the Convention, which states that every natural or legal person is entitled to the peaceful enjoyment of his possessions. He also claimed that this restriction could not present a reasonable balance between public interest and the deprivation this caused him. In addition, this restriction of his civil rights had not been preceded by a court hearing in accordance with article 6.
3. Mohammed Ali reminded the court that Sweden is bound by the European Convention on Human Rights, which is also an integrated part of EU law (such as general principles of law)
4. On 5 December 2002, the Court of First Instance passed judgement, without referring to the invoked rights under the European Convention in its statement. The court dismissed the case, mainly due to the fact that all the member countries were bound by the Charter of the UN. Chapter 7 of the Charter supersedes all other international law, including the rights under the European convention.
5. Mohammed Ali appealed the CFI's decision before the European Court of Justice. He asserted the same substantive grounds as in the CFI, and added that fundamental human rights, which are protected under the European Convention and the UN Charter, cannot be "overridden" by an international sanction system.
6. The European Court made a substantive examination of the case and dismissed the appeal on 7 August 2003. Like the CFI, the Court declared that EU member states are bound by the UN Charter, and that decisions made in accordance with Chapter 7 are binding upon the states and therefore upon the EC institutions also. On the question of human rights, which the UN Security Council is also obliged to respect, the Court ruled that only a small number of rights could be invoked as support in overruling a Security Council Resolution. This only included jus cogens (peremptory norms), which are described in article 53 of the Vienna Convention on the Law of Treaties. Identifying norms from which no derogation is permitted is a matter of dispute, but the Court identified them as aggression, genocide, apartheid and risk of torture. Neither article 6 nor article 1 of the first Protocol comes under this category. This means that it is possible to make a derogation from these rights, provided the derogation shows public or legitimate interest, that it is prescribed in sufficiently foreseeable law and that there is a reasonable proportion or balance between public interest and the deprivation the individual may suffer (i.e. the proportionality principle).

7. The European Court of Justice stated unequivocally that the measure had formal support both in international and national law, and that the consequences of these norms were foreseeable. The measures demonstrated the crucial and legitimate purpose of protecting the public against terrorist attacks. This purpose had been powerfully accentuated by the terrorist attacks on the World Trade Center on 11 September 2001 and the following attacks against Madrid and London. The European Court of Justice found that a proportionality examination must be assumed to have already been conducted, within the framework of the UN system, when the decision was made to apply the sanctions and maintain lists. It was not the duty of the European Court to re-examine the proportionality examination conducted by the UN. The appeal was accordingly dismissed.

APPEAL BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

1. On 1 October 2003, Mohammed Ali took his case to the European Court of Human Rights. The action was brought against Sweden, because Mohammed Ali came under its jurisdiction and because it was in Sweden that the sanction had been implemented. Mohammed Ali herewith asserted that, under article 1 of the European Convention, Sweden had a positive obligation to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention. According to Ali, this positive obligation also applied to measures based on EU and international law.
2. Mohammed Ali invoked the same substantive rights as he previously had done before the European Courts and also asserted that these courts, de facto, had not made any independent proportionality examination in relation to the circumstances of the individual case. According to him, this was not in keeping with the way the European Court examines alleged contravention of the proportionality principle. He felt that the EU's own interests had been weighed against his individual rights.
3. In a formal respect, Mohammed Ali considered that the ruling by the European Court of Justice on 7 August 2003 represented the "final decision", from which date, according to article 35 of the European Convention, a period of no more than six months may elapse, as an action brought before the European Courts is in any case conceivably likely to succeed. Therefore, these were the legal remedies which should be exhausted.
4. Mohammed Ali also asserted that there was not yet any possibility of bringing the European Union or its institutions before the European Court of Human Rights. Any such possibility would certainly be based on the Constitutional Treaty for the EU, article I-7 (2). However, the new treaty has not yet come into force.
5. According to Mohammed Ali, until the European Union can be taken to the European Court of Human Rights, the individual contracting states are in all circumstances responsible for alleged infringements of the European Convention emanating from the application of EU legislation.
6. Sweden lodged a defence on 7 January 2004, putting forward the following preliminary objections.
7. Even taking into account the fact that Swedish authorities had implemented the decision to freeze the assets, Sweden could not be a party before the European Court of Human Rights in the present case. The correct court for final examination of the case was the

European Court of Justice, which had already ruled against Mohammed Ali. The European Convention is also one of the general legal principles which the EU-court has to follow when examining the responsibility of an EC institution. Decisions of the European Court of Justice cannot be appealed to the European Court of Human Rights.

8. If, however, the European Court of Human Rights ruled that Sweden could be a party to the case, it was the government's opinion that there were effective domestic remedies to be exhausted. Mohammed Ali could either have applied to the Chancellor of Justice or brought a civil action for damages before the Swedish courts, but it is indisputable that he failed to use these remedies. The case would then be dismissed on formal grounds under article 35 of the Convention.
9. From a substantive perspective, the government referred to the reasons the European Court of Justice stated in its ruling. The government also pointed out that provided the action had not been dismissed on formal grounds, the fact that the state only obeyed binding international and EU law would be considered in a proportionality examination. It also stressed that even within the European Convention on the protection of Fundamental Rights and Freedoms, only a few rights are absolute and none of these have been violated in Mohammed Ali's case.
10. Mohammed Ali pressed his point that Sweden must be responsible for the infringements of his rights and that there were not any effective domestic remedies for lifting the sanctions or for obtaining compensation in the form of damages. The Office of the Chancellor of Justice is an authority which unilaterally decides on damages, and the Chancellor is also the Swedish government's legal representative. He further objected that an individual civil action for damages does not count as a remedy which must first be exhausted before the case can be heard in the European Court of Human Rights. To conclude he argued that none of these legal remedies can be used to get the sanctions lifted.
11. Mohammed Ali reminded the court that the sanctions were still in force against him (in an ongoing situation). This reason immediately superseded every otherwise conceivable formal obstacle to the examination of the case in the European Court of Human Rights. He rejected the claims by the government that only absolute rights or even peremptory norms must be respected when implementing resolutions by the Security Council.
12. On 25 March 2004, a chamber of seven judges delivered a verdict that the case should be heard and that the state's objections would be examined.
13. The Grand Chamber invited the parties to develop their grounds both in a substantive and formal respect and requested them to gather all previous and future argumentation into one script, including cause of action, petitions and development of the action.
14. The sanctions are still being imposed upon Mohammed Ali.

THE LEGAL BACKGROUND

The legal background to the measures taken against Mohammed Ali was as follows:

1. In October 1999, the UN Security Council, acting under Chapter 7 of the UN Charter, adopted a resolution (1267) on sanctions against the Taliban regime in Afghanistan.

These sanctions consist of restricted air travel and the freezing of funds and other financial assets which are owned or controlled, either directly or indirectly, by the Taliban regime. Under the resolution, a committee was also formed to deal with sanctions against the Taliban (the sanctions committee). The committee consists of representatives of 15 countries which are members of the Security Council. The Sanctions Committee's tasks include identifying funds and financial resources to be frozen. This is done by maintaining lists of names of people and organisations whose funds and financial resources are to be frozen.

2. In December 2000, the Security Council adopted a new resolution (1333), which in many respects sharpened the sanctions against the Taliban. The resolution introduced rules on the freezing of more funds and financial assets; namely those directly or indirectly owned or controlled by Osama bin Laden, and individuals and entities associated with him or the Al-Qaida network. The resolution also required all States to take measures to ensure that no funds or financial resources be made available, directly or indirectly, for the benefit of these individuals, organisations and entities.
3. Information on individuals or organisations upon whom sanctions should be imposed, or information on violation of the sanctions, can be submitted to the committee by states and regional organisations. Proposals for imposition of the sanctions, such as placing individuals or organisations on a blacklist, are normally circulated among members of the committee. If no objections have been received within the prescribed period the proposal is considered accepted and adopted (silent procedure).
4. In March 2001 the Sanctions Committee presented a first consolidated list for both Resolution 1267 and 1333. This list has since been amended a number of times. Together with some sixty individuals from different parts of the world, Mohammed Ali was first placed on the Sanction Committee's list at the proposal of the USA on 9 November. As far as is known, only his name was put forward to the committee, without specific grounds. Sweden did not object to the listing and Mohammed Ali was not informed of the actions until the Resolution was decided upon.
5. On 16 January 2002, the Security Council adopted Resolution 1390, which defined the measures to be taken against Osama bin Laden, members of the Al-Qaida organisation and the Taliban, and other individuals, groups, undertakings and entities associated with them. The obligation to freeze their funds and other financial assets was particularly emphasised. Mohammed Ali was still on the attached sanctions list.
6. Under Article 25 of the UN Charter, a Resolution of the Security Council is binding upon the UN's member states. Under Article 103 of the UN Charter, the obligations of the member states under a UN Resolution shall prevail over their obligations under other international agreements. Article 24 of the UN Charter states that the Security Council, in discharging its duties, shall respect human rights.
7. The Security Council's Resolution and the Sanction Committee's lists do not have a direct effect on the UN member states, but must be implemented in the national legislation in order to apply to an individual.
8. Resolution 1267 was implemented in the EU member states by means of the adoption of a Common Position on 15 November 1999 (99/727/CFSP) and the Council's Regulation (EC no. 337/2000) on 14 February 2000. Under the Council's Common Position, the implementation of sanctions came exclusively under the community's powers. No

national legislation was thus allowed. The freezing clauses were included in both documents. The same list of names drawn up by the Sanctions Committee applied to the Regulation. The EU Commission was also authorised to make amendments to the Regulation's list of names on the basis of new lists by the Sanctions Committee.

9. Resolution 1333 resulted in the EU modifying its regulations. The Resolution has been implemented by means of a new Common Position, adopted on 26 February 2001, and a new Council Regulation (EC) no. 467/2001, adopted on 6 March 2001. The new regulations involve freezing all funds and other financial assets belonging to an individual, entity or a body specified by the Taliban Sanctions Committee and listed in an annex to the Regulation. No funds or other financial resources may be made available, directly or indirectly, for the benefit of individuals, entities or bodies identified by the Taliban Sanctions Committee and listed in the annex.
10. The list of names in the annex is the same as the Sanction Committee's list of names.
11. As mentioned above the Sanctions Committee has amended its list of names several times, resulting in corresponding amendments to the list of names in the annex to the Regulation. The Commission's Regulation (EC) no. 2199/2001 on 12 November 2001 led to Mohammed Ali's first appearance on the EU sanctions list. It was an implementation of the updated list by the Sanctions Committee from November 9.
12. Since the UN Security Council adopted Resolution 1390 in January 2002, which contained changes to the sanctions regime against Afghanistan, the EU has been engaged in modifying the EU regulatory framework so that it is in complete accordance with the UN Resolution. New legislation in the form of a Common Position and a Regulation (council regulation (EC) no. 881/2002) was adopted by the EU Council of Ministers on 27 May. The new sanctions package replaced the previous regulations which ceased to apply. As Mohammed Ali's name was still on the UN Sanctions Committees list, it also appeared on the new list by the Commission.
13. Implementation of the current sanctions does not necessarily require an individual to have been accused or convicted of a crime. The same applies to the Sanctions Committee's decision to place the Swedish citizen on the list, and also to the Council's regulations and the EC Commission's lists. The criterion which applies at the present time does not concern links to the subsequently overthrown Taliban regime but association with Osama bin Laden and Al-Qaida.
14. On 20 December 2002, the Security Council adopted Resolution 1452 which allows UN member states to make exemptions from the freezing of funds and financial resources, as prescribed in Resolutions 1267, 1333 and 1390, on humanitarian grounds. The Council of Ministers implemented the resolution on 27 March 2003 by means of Regulation no. 561/2003, which specified exemptions for funds and financial resources which are "necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges."
15. Blacklisted individuals have no preferential right with regard to the Council or Sanctions Committee. In an attempt to improve the legal rights of the individual the Security Council in 2006 introduced a focal point to which the individual can apply in order to be de-listed. This procedure however requires that the state either put forwards the claim or allows in general for its citizens to apply directly to the focal point. So far only France has made

such a declaration. The individual does not have any right to appear before the Council or the Committee, any de-listing needs the approval of all the members in the Council.

MORE ON THE BACKGROUND RELATING TO EC LAW

1. Under article 249 of the EC treaty, EC Regulations are binding in their entirety and directly applicable in each member state. Consequently, the above-mentioned EC Regulations (from the Council and Commission) became directly applicable in Sweden when they came into force. As the freezing of Mohammed Ali's assets in Sweden emanated from an EC Regulation, the decision can be examined by the European Court of Justice. In this case, the action must be brought by an individual whom the decision affects, both directly and personally. An action brought by an individual is normally initially heard by the Court of First Instance, but can be appealed before the European Court of Justice.
2. Restrictions on the movement of capital between the community and third countries are not normally allowed. However, according to Article 301, where this is provided for in a common position relating to common foreign and security policy, the Council may take such necessary measures, acting by a qualified majority.
3. Under article 60, a member state may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. Such a decision can also be reversed by the Council of Ministers by a qualified majority. The fundamental rule is, however, that decisions on breaking off economic relations with third countries should be made at EU level.

APPENDICES

1. Judgement of the European Court of Human Rights in the case Matthews v. UK, 18 February, 1999.
2. Judgement of the European Court of Human Rights in the case Bosphorus Airways v. Ireland, 30 June 2005.
3. Decision by the European Court of Human Rights in the case Segi and Gestoras Pro-Amnistia v. Germany and others, 23 May 2002.
4. Judgement of the Court of First Instance on 21 September 2005 in the case Ahmed Yusuf and Al Barakaat v. European Council of Ministers (EU Commission).

The course of events is, as we know, based on real and much-discussed events, which involved the imposition of actual sanctions of the type described on individuals in different parts of the world. There is a wealth of material – all relatively easy to access – on the background and the motives for and against the sanctions. The Internet in particular should represent a rich source of information. An example of a particularly informative website is <http://www.statewatch.org/terrorlists/terrorlists.html>

Course management wants to make those taking part aware that this type of information can make the parties' argumentation concrete and effective.